



**BILLING CODE 3510-22-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**RIN 0648-XG383**

**Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Gustavus Ferry Terminal Improvements Project**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; proposed issuance of an Incidental Harassment Authorization; request for comments.

**SUMMARY:** NMFS has received a request from the Alaska Department of Transportation and Public Facilities (ADOT&PF) to issue an incidental harassment authorization (IHA) for activities that were not conducted under an existing IHA. NMFS previously issued an IHA to ADOT&PF to incidentally take seven species of marine mammal, by Level A and Level B harassment, during construction activities associated with the Gustavus Ferry Terminal Improvements project in Gustavus, Alaska. The IHA, issued on April 4, 2017 (82 FR 17209; April 10, 2017), is valid from December 15, 2017 through December 14, 2018. However, ADOT&PF was unable to conduct any of the work and, therefore, has requested that NMFS re-issue the IHA with the dates changed to accommodate the analyzed work with minor modifications to the number of piles driven. The proposed IHA would authorize work for the ferry improvements project between December 15, 2018 and December 14, 2019. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on the proposed issuance of an IHA to

incidentally take marine mammals during the specified activities. Take numbers would be the same as authorized previously, and the mitigation, monitoring, and reporting requirements would remain the same as authorized for the 2017-2018 IHA referenced above.

**DATES:** Comments and information must be received no later than [*INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE* **FEDERAL REGISTER**].

**ADDRESSES:** Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.pauline@noaa.gov*.

*Instructions:* NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period.

Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online *at*

*<https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>* without change. All personal identifying information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Rob Pauline, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the application, supporting

documents, list of the references cited in this document, **Federal Register** notice of proposed IHA (81 FR 40852; June 23, 2016), **Federal Register** notice of issuance of the final 2017-2018 IHA (82 FR 17209; April 10, 2017) and the issued 2017-2018 IHA may be obtained online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>. In case of problems accessing these documents, please call the contact listed above.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

NMFS has defined “negligible impact” in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably

likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The MMPA states that the term “take” means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal.

Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

#### **National Environmental Policy Act**

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action (*i.e.*, the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment. This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental harassment authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

### **History of Request**

On July 31, 2015, NMFS received an application from ADOT&PF requesting the take of marine mammals incidental to reconstructing the existing ferry terminal at Gustavus, Alaska, referred to as the Gustavus Ferry Terminal. NMFS published a notice of a proposed IHA and request for comments in the **Federal Register** on June 23, 2016 (81 FR 40852). We subsequently published the final notice of our issuance of the IHA on April 10, 2017 (82 FR 17209), making the IHA valid for December 15, 2017 through December 14, 2018. In-water work associated with the project was expected to be completed within the one-year timeframe of the IHA. The specified activities were expected to result in the take of seven species of marine mammals including harbor seal (*Phoca vitulina*), Steller sea lion (*Eumetopias jubatus*), harbor porpoise (*Phocoena phocoena*), Dall's porpoise (*Phocoenoides dalli*), killer whale (*Orcinus orca*), humpback whale (*Megaptera novaeangliae*), and minke whale (*Balaenoptera acutorostrata*).

On May 8, 2018, ADOT&PF informed NMFS that work on the project would be postponed due to design revisions and local community considerations and that no work would be completed under the 2017-2018 IHA. ADOT&PF requested that a new IHA be issued that would be valid from December 15, 2018 through December 14, 2019. Under this proposed IHA, ADOT&PF would conduct pile driving activities between the in water work window dates of March 1, 2019, through May 31, 2019 and September 1, 2019, through November 30, 2019. Although the proposed activities would undergo

minor modifications, the number of authorized takes would remain unchanged from those listed in the 2017-2018 Authorization.

*Description of the Proposed Activity and Anticipated Impacts*

The 2018-2019 proposed IHA would cover the same construction associated with the modernization of the Gustavus Ferry Terminal that the 2017-2018 did, with minor revisions to the number and types of piles that would be installed and removed. NMFS refers the reader to the documents related to the previously issued 2017-2018 IHA for more detailed description of the project activities. These previous documents include the **Federal Register** notice of the issuance of the 2017-2018 IHA for ADOT&PF's Gustavus Ferry Terminal Improvements project (82 FR 17209; April 10, 2017), ADOT&PF's application, the **Federal Register** notice of the proposed IHA (81 FR 40852; June 23, 2016) and all associated references and documents. A detailed description of the proposed vibratory and impact pile driving activities at the ferry terminal improvements project is found in these documents. The description remains accurate with the exception of the minor modifications noted above.

*Detailed Description of the Action*

Differences between the 2017-2018 IHA and the proposed 2018-2019 IHA are shown in Table 1. Generally speaking, pile driving and removal would occur over the same number of days (50) with installation and removal of 16 additional piles over 21 additional hours. These changes represent a 3.5 percent increase in the number of piles installed and a 21.9 percent increase in the number of piles removed. The duration of impact driving would remain the same while the time spent vibratory driving would increase by 18.4 percent. The additional time required for vibratory driving is due to the

increase in anticipated number of piles removed. Note that these proposed changes would have a nominal impact on the calculated Level A harassment isopleths and no effect on Level B harassment isopleths. Therefore, the sizes of the Level A harassment and Level B harassment zones would remain unchanged.

**Table 1. Gustavus Ferry Pile Installation and Removal Summary.**

<b>Pile size (Inches)</b>	<b># of piles – 2017-2018 IHA</b>	<b># of piles – 2018-2019 Proposed IHA</b>
30	14	18
24	40	34 install/12 remove
18	0	4 remove
16	0	4 install/4 remove
12.75	3 install/16 remove	3 install/9 remove
Total installed/total Piles	57/73	59/89
<b>Driving Time Duration</b>	<b>2017-2018 IHA (hours)</b>	<b>2018-2019 Proposed IHA (hours)</b>
Impact Driving	57	57
Vibratory Driving	114	135
Total	171	192

#### *Description of Marine Mammals*

A description of the marine mammals in the area of the activities is found in these previous documents, which remains applicable to the proposed 2018-2019 IHA as well. In addition, NMFS has reviewed recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and recent scientific literature, and determined that no new information affects our original analysis of impacts under the 2017-2018 IHA.

#### *Potential Effects on Marine Mammals*

A description of the potential effects of the specified activities on marine mammals and their habitat may be found in these previous documents, which remains applicable to the issuance of the proposed 2018-2019 IHA. There is no new information on potential effects.

### *Estimated Take*

A detailed description of the methods and inputs used to estimate authorized take is found in these previous documents. The methods of estimating take for the proposed 2018-2019 IHA are identical to those used in the 2017-2018 IHA. The source levels remain unchanged from the previously issued IHA, and NMFS' 2016 acoustic technical guidance was used to address new acoustic thresholds in the notice of issuance of the 2017-2018 IHA. Specifically, observational data was used to calculate daily take rates in the absence of density data. Since the number of pile-driving days (50) planned for both the 2017-2018 IHA and the proposed 2018-2019 IHA are the same, the total estimated take projections will be identical.

### *Description of Proposed Mitigation, Monitoring and Reporting Measures*

A description of proposed mitigation, monitoring, and reporting measures is found in the previous documents, which are identical to those contained in this proposed 2018-2019 IHA. The following measures would apply to ADOT&PF's mitigation requirements:

- Establishment of Shutdown Zone—For all pile driving activities, ADOT&PF will establish a shutdown zone. The purpose of a shutdown zone is generally to define an area within which shutdown of activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). In this case, shutdown zones are intended to contain areas in which sound pressure levels (SPLs) equal or exceed acoustic injury criteria for some authorized species, based on NMFS' acoustic technical guidance published in the **Federal Register** on August 4, 2016 (81 FR 51693).
- Establishment of Monitoring Zones—ADOT&PF must identify and establish Level A harassment zones. These zones are areas beyond the shutdown zones where animals may be exposed to sound levels that could result in permanent threshold shift (PTS). ADOT&PF will also identify and



establish Level B harassment disturbance zones which are areas where SPLs equal or exceed 160 dB rms for impact driving and 120 dB rms during vibratory driving. Observation of monitoring zones enables observers to be aware of and communicate the presence of marine mammals in the project area and outside the shutdown zone and thus prepare for potential shutdowns of activity. NMFS has established monitoring protocols described in the **Federal Register** notice of the issuance (82 FR 17209; April 10, 2017) which are based on the distance and size of the monitoring and shutdown zones. These same protocols are contained in this proposed 2018-2019 IHA.

- **Temporal and Seasonal Restrictions**—Work may only occur during daylight hours, when visual monitoring of marine mammals can be conducted and all in-water construction will be limited to the periods between March 1 and May 31, 2018, and September 1 and November 30, 2018.

- **Soft Start**—The use of a soft-start procedure is believed to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, contractors will be required to implement soft start procedures. Soft Start is not required during vibratory pile driving and removal activities.

- **Visual Marine Mammal Observation**—Monitoring must be conducted by qualified marine mammal observers (MMOs), who are trained biologists, with minimum qualifications described in the **Federal Register** notice of the issuance of the 2017-2018 IHA (82 FR 17209; April 4, 2017). In order to effectively monitor the pile driving monitoring zones, two MMOs must be positioned at the best practical vantage point(s). If waters exceed a sea-state which restricts the observers' ability to make observations within the shutdown zone (*e.g.*, excessive wind or fog), pile installation and removal will cease. Pile driving will not be initiated until the entire shutdown zone is visible. MMOs shall record specific information on the sighting forms as described in the **Federal Register** notice of the issuance of the 2017-2018 IHA (82 FR 17209; April 10, 2017). At the conclusion of the in-water construction work, ADOT&PF will provide NMFS with a monitoring report which includes summaries of recorded takes and estimates of the number of marine mammals that may have been harassed.

## **Determinations**

ADOT&PF proposes to conduct activities similar to those covered in the previous 2017-2018 IHA. As described above, the number of estimated takes of the same stocks of marine mammals is the same as those authorized in the 2017-2018 IHA that were found to meet the negligible impact and small numbers standards. Our analysis showed that less than 9.07 percent of the populations of affected stocks, with the exception of minke and killer whales, could be taken by harassment. For Northern resident and West Coast transient killer whales, the percentages, when instances of take are compared to abundance, are 48.2 percent and 51.8 percent, respectively. However, the takes estimated for these stocks (up to 126 instances assuming all takes are accrued to a single stock) are not likely to represent unique individuals. Instead, we anticipate that there will be multiple takes of a smaller number of individuals.

The Northern resident killer whale stock are most commonly seen in the waters around the northern end of Vancouver Island, and in sheltered inlets along B.C.'s Central and North Coasts. They also range northward into Southeast Alaska in the winter months. Pile driving operations are not permitted from December through February. It is unlikely that such a large portion of Northern resident killer whales with ranges of this magnitude would be concentrated in and around Icy Passage.

NMFS believes that small numbers of the West coast transient killer whale stock would be taken based on the limited region of exposure in comparison with the known distribution of the transient stock. The West coast transient stock ranges from Southeast Alaska to California, while the proposed project activity would be stationary. A notable percentage of West coast transient whales have never been observed in Southeast Alaska. Only 155 West coast transient killer whales have been identified as occurring in

Southeast Alaska according to Dahlheim and White (2010). The same study identified three pods of transients, equivalent to 19 animals that remained almost exclusively in the southern part of Southeast Alaska (*i.e.* Clarence Strait and Sumner Strait). This information indicates that only a small subset of the entire West coast Transient stock would be at risk for take in the Icy Passage area because a sizable portion of the stock has either not been observed in Southeast Alaska or consistently remains far south of Icy Passage.

There is no current abundance estimate for minke whale since population data on this species is dated. However, the proposed take of 42 minke whales may be considered small. A visual survey for cetaceans was conducted in the central-eastern Bering Sea in July-August 1999, and in the southeastern Bering Sea in 2000. Results of the surveys in 1999 and 2000 provide provisional abundance estimates of 810 and 1,003 minke whales in the central-eastern and southeastern Bering Sea, respectively (Moore *et al.*, 2002). Additionally, line-transect surveys were conducted in shelf and nearshore waters in 2001-2003 from the Kenai Fjords in the Gulf of Alaska to the central Aleutian Islands. Minke whale abundance was estimated to be 1,233 for this area (Zerbini *et al.*, 2006). However, these estimates cannot be used as an estimate of the entire Alaska stock of minke whales because only a portion of the stock's range was surveyed. (Allen and Anglis 2012). Clearly, 42 authorized takes should be considered a small number, as it constitutes only 5.2 percent of the smallest abundance estimate generated during the surveys just described and each of these surveys represented only a portion of the minke whale range.

Note that the numbers of animals authorized to be taken for all species, with the exception of Northern resident and West coast transient killer whales, would be

considered small relative to the relevant stocks or populations even if each estimated taking occurred to a new individual—an extremely unlikely scenario.

The proposed 2018-2019 IHA includes mitigation, monitoring, and reporting requirements that are identical to those depicted in the 2017-2018 IHA, and there is no new information suggesting that our analysis or findings should change.

Based on the information contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; and (4) ADOT&PF's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action.

### **Endangered Species Act (ESA)**

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

In order to comply with the ESA, NMFS Alaska Regional Office (AKR) Protected Resources Division issued a Biological Opinion on March 21, 2017 under section 7 of the ESA, on the issuance of an IHA to ADOT&PF under section

101(a)(5)(D) of the MMPA. This consultation concluded that the project was likely to adversely affect but unlikely to jeopardize the continued existence of the threatened Mexico DPS of humpback whale (*Megaptera novaeangliae*) or the endangered western DPS of Steller sea lion (*Eumatopias jubatus*), or adversely modify designated critical habitat for Steller sea lions. In a memo dated June 13, 2018, NMFS AKR concluded that re-initiation of section 7 consultation is not necessary for the issuance of the proposed 2018-2019 IHA. The only modification to the project is a time shift of one year. No additional take has been requested by ADOT&PF or is proposed for authorization by NMFS. All mitigation measures described in the Biological Opinion would be implemented to reduce harassment of marine mammals and document take of marine mammals. For these reasons, we anticipate no new or changed effects of the action beyond what was considered in the 2017 Biological Opinion.

#### **Proposed Authorization and Request for Public Comments**

As a result of these determinations, NMFS proposes to issue an IHA to ADOT&PF for the Gustavus Ferry Terminal Improvements project in Gustavus, AK from December 15, 2018 through December 14, 2019, provided the previously described mitigation, monitoring, and reporting requirements from the 2017-2018 IHA are incorporated. We request comment on our analyses and the proposed issuance of the IHA which would be identical to the previous IHA

(<https://www.fisheries.noaa.gov/action/incidental-take-authorization-alaska-dot-gustavus-ferry-terminal-improvement-project>). We also request comment on the potential for renewal of this proposed IHA as described in the paragraph below. Please include

with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

On a case-by-case basis, NMFS may issue a second one-year IHA without additional notice when (1) another year of identical or nearly identical activities as described in the Specified Activities section is planned or (2) the activities would not be completed by the time the IHA expires and a second IHA would allow for completion of the activities beyond that described in the Dates and Duration section, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to expiration of the current IHA;

- The request for renewal must include the following:

- (1) An explanation that the activities to be conducted beyond the initial dates either are identical to the previously analyzed activities or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, take estimates, or mitigation and monitoring requirements; and

- (2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized; and

- Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures remain the same and appropriate, and the original findings remain valid.

Dated: August 3, 2018.

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Donna S. Wieting,

Director, Office of Protected Resources,

National Marine Fisheries Service.

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